

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP539-CR

Cir. Ct. No. 2010CF232

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE A. TRINKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 GUNDRUM, J. George A. Trinka appeals from a judgment convicting him of first-degree reckless homicide and first-degree recklessly endangering safety, both with the use of a dangerous weapon, following a jury trial. Trinka argues that the trial court erred when it allowed the State to introduce

into evidence a family photograph depicting the victim, his wife, and his children. We affirm because we conclude that, even if the court did err, the error was harmless.

Background

¶2 Trinka was charged with first-degree reckless homicide and first-degree recklessly endangering safety, both with the use of a dangerous weapon, following the shooting of the victim in this case.¹ The related trial lasted five days and included three days of testimony by eighteen witnesses and over 150 exhibits, including dozens of photographs. Based upon the parties' appellate briefs and our review of the record, the following encapsulates the most significant testimony from the trial.

¶3 At the time of the shooting, Trinka resided in the home of Connie Puerling and had done so for approximately fifteen years. On July 24, 2010, members of Puerling's family gathered at her home. During the gathering, Puerling gave her grandson, who was the son of the victim and his wife (Puerling's daughter), permission to mow the lawn. While the grandson was getting the lawnmower out of the garage, Trinka and the victim had an "angry conversation," which included swearing at each other.

¶4 Puerling testified that, at some point thereafter, she went into the basement to confront Trinka about giving "grief" to people, which led to the two yelling at each other, and that during that confrontation, the victim's wife also

¹ For trial, the court severed a third count against Trinka, felon in possession of a firearm. Trinka pled no contest to this charge after his trial and conviction on the two counts we address on appeal.

came into the basement and yelled at Trinka. Puerling testified that the victim's wife pushed Trinka, that Trinka grabbed the phone and said he was going to call 911, and that the wife took the phone from him and said she would call 911. While the victim's wife had the phone to call 911, the victim came in, looked at his wife and Trinka and "started on" Trinka, though Puerling could not recall what the victim said to Trinka. Puerling heard a "bang" or "pop" and then turned and looked at the victim, who was across a table from Trinka. Puerling observed Trinka "sitting there with the [hand]gun pointed" at the victim and observed the victim put his hand on and look at his chest and say, "I can't believe you shot me. You fucking shot me." Puerling did not see the victim struggle with Trinka for the gun, but did observe the victim's wife run upstairs with the phone and gun.

¶5 Puerling further testified that, after the shooting, her daughter-in-law (sister-in-law to the victim and his wife) ran down into the basement and was trying to help the victim when Trinka grabbed a shotgun, aimed it at the daughter-in-law, and said, "Get away from him or you'll be next." Puerling then grabbed the shotgun from Trinka, who grabbed it back, pointed it under his chin and, with one hand by the trigger said, "I should just make everybody happy and pull the trigger." Puerling thereafter regained the weapon and ran out of the house with it. During her testimony, Puerling also read aloud from a statement she wrote for police the night of the shooting. Along with other parts of the statement, she read: "[Trinka] picked up the handgun and shot [the victim]"; "[Trinka] pick[ed] up a shotgun and was going to shoot again. I grabbed the barrel and fought with him and he said, you want me to shoot myself"; "[the victim] came in the rec room and said a few words and [Trinka] picked up the gun and shot at [the victim]"; and "[Trinka] intentionally pointed the gun to [sic] [the victim]."

¶6 On cross-examination, Puerling testified that her children did not like Trinkka and he did not like them, that her children wanted Trinkka out of her house, and that after her grandson had gotten out the lawnmower, the victim had told her that Trinkka was “being an asshole again.”

¶7 The victim’s wife testified as follows. She went downstairs after Puerling and yelled at Trinkka that the grandson had just wanted to cut the grass; she pushed Trinkka and Trinkka pushed her back. Trinkka said he was going to call 911, and she grabbed the phone from him and said she would call 911. She turned her back to Trinkka to make the call and, during this time, heard a “pop.” When she looked in the direction of Trinkka, she observed the victim look down at and wipe his chest and then try to get the gun from Trinkka. After taking the gun, the victim handed it to her, and she took it upstairs and left it there. She eventually returned to the basement, and while helping the victim and speaking with 911, she looked up and saw Trinkka “with another gun, a longer gun.” She observed Puerling “struggling” to get that gun away from Trinkka. She ran outside through a service door and subsequently observed Puerling emerge through the same door with “the long gun.”

¶8 A recording and transcript of the wife’s 911 call were admitted into evidence, and the recording was played in court. The wife testified as to her voice on the call as well as to Trinkka’s and Puerling’s. She testified that, among other things, she said, “[Trinka], stop,” and Trinkka said, “Open the fucking door,” and that when she stated on the call that somebody had “a fucking gun,” she was referring to Trinkka having a shotgun.

¶9 On cross-examination, she acknowledged that in a statement she gave to police the night of the shooting she stated, “I heard a pop sound. [The

victim] was then trying to wrestle the gun away.... [The victim] got the gun away from [Trinka] and handed it to me. As [the victim] handed the gun to me, he told me he had been shot.” She further acknowledged that on occasion there were “issues” between Trinka and members of the family, including the victim; that the victim had been upset after exchanging words with Trinka when the grandson was getting the lawnmower out of the garage; and that she, the victim, and others at the gathering had been drinking. On redirect, the wife confirmed that her testimony on the stand is how she recalled the order of events regarding observing the victim wrestle the gun from Trinka.

¶10 Puerling’s daughter-in-law also testified. Her testimony included recognition that she needed and had “hearing assistance” for both of her ears and that she had had that “for a period of time.” She stated that when the victim’s wife came upstairs and said the victim had been shot, she (the daughter-in-law) went downstairs to help him. She further testified:

[W]hen I first seen him, I was shocked, and I looked over to my left and [Trinka] was standing there with a gun pointed at me, so I looked back at [the victim] and I’m like oh my God, stay calm. So I looked back at [Trinka] and I said [Trinka], put the gun down. And he mumbled something, and then he said, nobody’s going to come in my fucking basement and shove me around. So then I looked back at [the victim] and I’m like, oh my God, I could get shot here and I looked back at [Trinka] again and I’m sorry, [victim], and I ran back out.

She stated that Trinka had both hands on the long gun and confirmed he was pointing it at her in a “ready position,” demonstrating with her right arm fully extended to simulate the barrel of the gun. She further testified that she had not been drinking that evening.

¶11 On cross-examination, the daughter-in-law acknowledged that, prior to the shooting, the victim had been upset with Trinka and shared his feelings with Puerling. She agreed that they were “all,” including the victim, talking about getting Trinka “out of the house,” and that everybody had wanted that “for quite some time.” Asked if Trinka told her to get away from the victim or that she would “be next,” she responded, “No.” On redirect, she reconfirmed that when she saw Trinka holding the shotgun, she heard him mumble something, but that she did not know what he said.

¶12 A detective testified regarding a videotaped interview of Trinka conducted by law enforcement the night of the shooting and a transcription of the interview; the jury viewed portions of each. Referring to a still photo from the video, the detective described Trinka as holding his hand up in “a pistol-type shape or position” and explained that that was the point during the interview when Trinka “was saying that that’s when he (Trinka) picked up the gun and he said, and I have in quotes here, I’m going to shoot your fucking ass.”

¶13 On cross-examination, the detective testified that Trinka stated during the interview that earlier in the evening the victim had said he would “beat” Trinka’s “ass” and that, shortly before the shooting, the victim again stated he was going to “kick” Trinka’s “ass.” He testified that Trinka also stated many times throughout the interview that the victim had grabbed the gun and that was what caused it to discharge. He further testified to wounds Trinka had on his hand and head and to Trinka’s explanation that these resulted from the victim struggling to get the gun from Trinka. The detective also testified that Trinka had stated during the interview that Puerling and the victim’s wife were not present when the victim was shot.

¶14 A firearms examiner from the state crime laboratory testified that the revolver involved in the shooting could not be fired by a squeeze of the trigger alone, but required a person to fully cock the hammer at the top rear of the gun prior to the trigger being pulled. He further testified that, based on his examination of the shirt the victim was wearing when shot, through which the bullet travelled, the shot had to have been fired from between twelve to eighteen inches from the victim. On cross-examination, he testified that it would not have taken much pressure to activate the trigger to fire the weapon.

¶15 Evidence at trial showed that the victim was wearing a short-sleeve shirt at the time of the shooting. A medical examiner testified that if a person was wearing a short-sleeve shirt, forearms and hands in front of the muzzle or cylinder of a revolver would be exposed to gunpowder residue coming out of the revolver and that her examination of the victim showed there was no gunpowder residue on the victim's hands or forearms. On cross-examination, the medical examiner testified that the victim's blood alcohol level was .20 percent.

¶16 A corrections officer at the Washington County Jail also testified, stating he overheard Trinkka "matter-of-factly" make a statement at the jail to the effect of "the ding dong pissed me off, so I killed him." Trinkka did not testify at the trial.

¶17 Prior to closing arguments, the trial court instructed the jury on the charged offenses—first-degree reckless homicide and first-degree recklessly endangering safety, both with the use of a dangerous weapon, as well as on self-defense and the lesser-included offenses of second-degree reckless homicide with the use of a dangerous weapon, homicide by negligent handling of a dangerous weapon, and second-degree recklessly endangering safety. In its closing, the State

argued that Trinka shot the victim before the victim grabbed for the gun, but that even if the jury believed the victim grabbed the gun prior to the shooting, Trinka was still guilty of first-degree reckless homicide. The State further contended that Trinka was guilty of first-degree recklessly endangering safety because of pointing the shotgun at Puerling's daughter-in-law after the victim was shot. The defense argued that Trinka acted in self-defense and that the shooting was an accident caused by the victim attempting to take the gun from Trinka. As to the second charge, the defense contended that "[s]imply pointing a weapon with no other action is not endangering the safety of someone else." The jury found Trinka guilty on both offenses as charged. Trinka appeals. Additional facts will be included as necessary.

Discussion

¶18 Over Trinka's relevance objection, the trial court permitted the State to introduce a photograph depicting the victim with his wife and four children as part of general background information testified to by the victim's wife. On appeal, Trinka argues that the court erred in permitting use of the photo, contending that it was irrelevant and prejudicial, improperly invoking sympathy from the jury. He submits that the sympathetic impact of the photo was exacerbated by subsequent testimony (to which he did not object) that the victim was a good family man. The State, while "not conced[ing]" that the court erred in admitting the photo, argues that, even if it was admitted in error, the error was harmless. We agree with the State.

¶19 We assume, without deciding, that the photo was admitted in error. In considering whether the erroneous introduction of evidence is harmless, the burden is on the party benefitting from the error, here the State, to show that "it is

clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *State v. Martin*, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W.2d 270 (quoting *State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189) (internal quotation marks omitted). Ultimately, to conclude that an error was harmless, we must be convinced “that the jury *would* have arrived at the same verdict had the error not occurred.” *Id.*

¶20 In *Martin*, our supreme court enumerated several nonexhaustive factors that assist us in our analysis: (1) the frequency of the error, (2) the importance of the erroneously admitted evidence, (3) the presence or absence of evidence corroborating or contradicting the evidence, (4) whether the evidence duplicates untainted evidence, (5) the nature of the defense, (6) the nature of the State’s case, and (7) the overall strength of the State’s case. *Id.*, ¶46. We consider these factors.

¶21 *Frequency of the error.* The State states that the photo “was used very briefly at the beginning of a multi day trial.” Trinka concedes that the photo “was shown once.” Our review confirms that the photo was used once, during the direct examination of the victim’s wife, the third witness out of eighteen in the course of the trial. The single reference to the photo was made shortly after she testified as to the names and ages of their four children, testimony to which Trinka did not object.

¶22 *The importance of the erroneously admitted evidence.* The State contends that “[t]he jury simply did not buy [Trinka’s] story and the brief use of the photograph would not reasonably have any effect on that decision.” Trinka complains that the photo and family background testimony reminded the jury that Trinka “took a good father away from the children.” The record indicates that the

State presented a strong case, as the stated facts show. Further, Trinka has not identified any trial reference to the photo beyond that made by the victim's wife. The record does not suggest that the State utilized the photo in its opening or closing statements, and there is nothing in the record to suggest the jury gave any particular consideration to the photo; indeed, the jury's single inquiry during deliberations related to the medical examiner's testimony regarding the lack of gun powder on the victim. The record reflects that the subject photo was used only once, near the beginning of the victim's wife's testimony, to aid in identifying the victim's family. The photo was of very marginal importance.

¶23 *The presence or absence of evidence corroborating or contradicting the evidence and whether the evidence duplicates untainted evidence.* As Trinka notes, “[w]itnesses testified that [the victim] was married and had four children.” Indeed, the victim's wife and son testified to these same facts, without objection. Trinka essentially complains that the photo of the family had more “emotional impact” than *testimony* about it. We doubt that the brief use of the photo carried any “emotional impact” beyond that which could have arisen from the live, in-person testimony of the victim's wife and son recounting what they witnessed on the day their husband and father was killed.

¶24 *The nature of the defense and the State's case, and the overall strength of the State's case.* The defense highlighted the victim and Trinka's mutual dislike for one another, and emphasized that, on the day of the shooting, the victim stated more than once that he would “beat” or “kick” Trinka's “ass.” The defense contended that the victim's family instigated the fatal confrontation, Trinka was acting in self-defense, and the victim was shot because the gun Trinka was holding accidentally discharged when the victim grabbed for it.

¶25 Testimony of the State’s witnesses and Trinka’s own statement to law enforcement demonstrate that it was undisputed that the victim was killed by the gun Trinka had drawn. Despite some inconsistencies in their respective versions of events surrounding the shooting, the State’s witnesses supported the State’s theory that the shooting was not an accident. In its closing argument, the State pointed to testimony that after the victim was shot, Trinka subsequently pointed a shotgun at Puerling’s daughter-in-law when she came downstairs to help the victim and that Puerling had to wrestle the gun away from Trinka; the medical examiner’s testimony that she found no evidence of gun powder on the victim’s exposed arms or hands; the firearms examiner’s testimony that two actions needed to occur for the revolver to fire—a cocking back of the hammer and a squeezing of the trigger, as opposed to requiring only a squeeze of the trigger; and the testimony of the officer at the jail that he overheard Trinka comment, “[D]ing dong pissed me off ... so I killed him.”

¶26 Based on our review, we conclude the State presented a strong case that Trinka was guilty of the two charged offenses. Had the jury found the State’s evidence lacking, it could have found Trinka guilty of lesser-included offenses, instead of the charged offenses. It did not. The challenged photo played an extremely minor, indeed almost insignificant, role in the trial. Considering the entire trial record in light of the *Martin* factors, we have no doubt “that the jury *would* have arrived at the same verdict” had the photo not been used. *See id.*, ¶45.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

